Remarks of

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I'm glad to be with you this afternoon.

I'd like to talk briefly with you about the political climate in Washington surrounding tort law and about some of the many issues regarding which relief and reform are proposed.

In summary the situation can be put this way: Both the public and politicians are increasingly aware of liability. While each instance has its own circumstances and interest, each has been condensed by the press and the lobbyists into a problem with lawyers.

In the Subcommittee I chair, a number of problems have arisen as debates about litigation:

Over the past six months, there have been nationwide shortages of vaccines against childhood illnesses. Manufacturers maintain that they are unable to get adequate liability insurance. Insurers say that the risks of severe vaccine injury and large awards are too large to cover.

Medical malpractice premiums have risen dramatically. As you know this is not a new phenomenon, but the calls for Federal legislative aid to doctors are now accompanied by calls for aid to midwives and even to State insurance pools.

Manufacturers of consumer products have come to Congress to ask for special relief from lawsuits. Industry lobbyists now describe the need for predictability and uniformity in the system, although I'm afraid that many proposals are, predictably and uniformly, to prevent consumers from recovering in court.

Toxic substances have been stored and spilled throughout the country, and no one seems willing to undertake their cleanup or to pay for the care of those injured.

Each of these problems is unique, but together they represent a trend to blame the legal system for problems in manufacture, services, or insurance. The center of attention has become fees and awards. Little attention has been focused on the injuries of consumers and workers and even less on the protection of the public from dangers that are avoided.

The result, I am afraid, is a wave of political and public sympathy for changes in the traditional tort remedies. And I must tell you that a large number of manufacturers and insurers are ready to ride that wave to their own gain and to limit the protection of the public.

Please don't misunderstand me. I don't mean to suggest that I believe the tort system has evolved into the perfect means for dealing with all problems of competing social goals and intricate scientific questions of cause, effect, and responsibility.

In my opinion, some areas of liability law will probably have to be fine-tuned or carefully re-directed to accomodate increasingly complex situations. But I fear that the current political desire for change in the law is not for such careful change, but for a blunt legal instrument to protect all defendants--however dirty their hands--and to leave the hapless consumer with a brief warning and a lot of assumed risk.

Let me give you a few examples of current problems in Washington, as well as a few opinions about their potential meaning and solution.

Probably the most interesting and difficult of the recent insurance and liability problems that has come to the Congress is the issue of vaccine compensation. I'm sure that some of you, either in your personal capacity as parents or your professional capacity as litigators, are familiar with the facts, but let me outline them briefly.

The childhood immunization campaign in this country has been a phenomenal success. Thirty years ago polio was a household fear and thousands of children were crippled or killed. Last year there was not a single natural case of the disease.

Despite rising costs and Federal cutbacks in support, more children than ever before are protected against polio, as well as such once-common diseases as measles and whooping cough. It is vital that we continue the public's immunity to these illnesses. We cannot allow children to die of diseases that should never occur and we cannot afford to treat children for crippling conditions that we can prevent.

Much of the success of this program arises from State requirements that all children be immunized before they begin school. All fifty States now have such a requirement.

But vaccines are not perfectly safe. Under current circumstances, vaccines can be predicted to cause a certain number of side-effects, injuries, and even deaths. The relative number of such injuries is small when compared with the severity of the disease and epidemics. But however small the number may be, the simple fact is that some children will be hurt.

The particular paradox of vaccine injuries is that these children really are hurt in the line of public duty. They are required to receive vaccinations not just for their own protection, but also for the group immunity necessary to protect the population and for the benefit of a society that is seeking to avoid the price of disease treatment.

To care for these injured children, parents go to court to sue the manufacturer of the vaccine and the doctor who administered it. This is, in some ways, also a paradox, for, by many accounts, injury is inevitable but often not predictable.

In many jurisdictions, court action is also inadequate, because without strict liability standards, parents are deemed to have undertaken the risk of an unavoidably dangerous vaccine, even though the vaccine is required by law.

The situation is complicated by the lack of research data on the safety of vaccines and the number of injuries that might be predicted. Scientific controversies are raging about the whooping cough vaccine in particular, and allegations of severe negligence are made against manufacturers.

In response to the growing public attention to vaccine injury and to the suits brought against them, vaccine manufacturers have come to Congress to seek relief, and the petition is not just a plea, but a real threat to the adequacy of the vaccine supply. Manufacturers maintain that obtaining insurance is increasingly difficult and that, without insurance, they are unwilling to stay in the business.

Indeed during this past winter, while one manufacturer was searching for insurance, the Nation experienced a shortage of perhaps two million doses of whooping cough vaccine. Supplies were rationed and limited to infants, postponing needed booster shots.

Meanwhile, parents' organizations are coming to Congress to ask for more equitable remedies against manufacturers and for the preservation of the rights that injured children have now.

The problem is complex. As a society we must maintain the vaccine supply, maintain public confidence in the vaccine, maintain immunization levels, make the safest vaccine possible, and compensate anyone injured.

In many ways, the most direct way to achieve these goals would be for the Federal government to undertake the manufacture, distribution, and compensation of vaccines. Largely for reasons of cost, few people are willing to undertake such a project, least of all the Reagan Administration.

Indeed the Reagan Administration's response to the whole problem of vaccines is quite simple. Their proposed legislative remedy--which will be introduced as soon as they can find any Member of Congress to support it--consists of two provisions: The elimination of all punitive damages in tort suits against manufacturers and the limitation of pain and suffering damages to $100,000 in each case.

No mention is made of injured or disabled children. No public responsibility is recognized. The only beneficiaries of the Reagan plan are the manufactures and their insurers. Neither the parents nor the public health are served.

I believe that some government action is necessary in this area. But I believe that the action required is to expand remedies available to consumers. If a compensation system can be created that will be direct, efficient, and fair, that system need not preempt the courtroom: If compensation is all these things parents will avoid the uncertainty and delay of litigation by choice, not by law.

Moreover, I believe that the legal system can serve us well to ensure that all appropriate safeguards are taken by manufacturers and physicians. No legislative remedy should insulate defendants against negligence.

Medical Malpractice

As compelling as the arguments for some change in compensation and tort law may be in the case of vaccine, those who would carry this argument further to cover all medical malpractice make a much less clear case

As you are all well aware, a new medical malpractice "crisis" has been declared by physicians, their insurers, and the media. The evening news has stories about country doctors giving up their practices and locking their doors, because they cannot pay their malpractice premiums. Physicians appear on talk shows and describe apparently outrageous suits they are forced to defend.

As a result, the Congress feels mounting pressure to pass medical malpractice changes. Bills have been introduced and referred to my Subcommittee. Requests are repeatedly made to hold hearings.

But I question whether this is an appropriate area for Federal legislation. I believe that such action would be justified only if it becomes clear that the problem has overwhelmed the States.

By every measure, medical malpractice has traditionally been a responsibility of State legislatures. Insurance is regulated by States. States issue professional licences and monitor the quality of medical care. Individual substantive rights arise under State laws. My experience as the Chairman of the California Assembly's Select Committee on Medical Malpractice confirmed my belief that this area should remain under State purview.

But the pressure to legislate is increasing daily.

New situations arise in malpractice affecting constituents and consumers, and with each news story or insurance hike, more bills are introduced.

Nurse Midwives and Insurance

One of the new malpractice dilemmas that has arisen provides a particularly telling look into what may be the heart of the problem--the insurance industry. No one can debate for long that the insurance industry has a very difficult and complex task in deciding the underwriting costs for pharmaceuticals or for medical malpractice or for manufacturers of dangerous products. But the recent case of the nurse midwives seems to belie the argument that litigation and damages are the sole source of such difficulties.

Nurse midwives have become respected professionals in the modern health marketplace. With a long history of providing services to the poor, midwives have in the last decade become increasingly in demand for middle class and affluent women who preferred individual attention and extensive prenatal care.

This past July, nurse midwives who practice independently of hospitals lost their group malpractice coverage. This termination seemed to be without explanation, since litigation against midwives has been relatively rare. Theories about the possible explanation abound--ranging from insurers' fears of the claims against obstetricians to conspiracies among physicians and insurers to reduce competition.

But whatever the explanation, it seems clear that a history of liability did not cause the cancellation.

Some have called for Federal action to provide insurance. In this area, too, however--although I am disturbed by the denial of coverage--I believe that States should be the first asked to solve the problem, along with the Federal Trade Commission if anti-competitive practices seem real.

Insurance

But I think this example demonstrates the fundamental role that insurance plays in all of the liability "crises".

Premiums in almost all areas of insurance have reached crisis proportions in recent years. According to reports in the Wall Street Journal and the Washington Post, property and casualty insurance rates have recently climbed faster than at any time in this century. This reflects the insurance industry's worst losses ever--not just in claims but as a once-profitable industry.

In 1984, underwriting losses outpaced investment income for the first time since 1906, the year of the San Francisco fire. As the case of nurse-midwives demonstrates, even those with virtually perfect safety records are finding it difficult, if not impossible, to find insurance. Those that do, whether service providers or manufacturers, are routinely facing annual increases of up to 300 percent, often for substantially reduced coverage.

Many insurance companies insist that the growth in the size and number of liability judgments is the cause of these swollen premiums. I'm sure that there is some truth in that.

But many observers also believe that the increases in premiums arise from different causes:

The industry may be attempting to re-capture revenues lost in the fierce competition for clients when interest rates were high.

The industry may be trying to recover from a series of investment losses in its portfolio over the past five years.

The industry may be compensating for the erosion of the foreign reinsurance market by the strong dollar, a particular problem since insurers have traditionally covered themselves with overseas carriers for catastrophic losses.

I mention all these possibilities, not because I want to dwell on the woes of the insurance industry, but because I believe it is essential that we not fool ourselves about how much relief is offered to midwives or vaccine manufacturers by legislation to limit liability. Limiting awards, providing uniformity in liability, creating alternate compensation systems--all may help stabilize the insurance industry and thus aid those who are insured. But everyone should understand that there will still be problems, perhaps even the same problems, because the insurance industry itself has difficulties with business cycles that cannot be resolved by tort reform.

Environmental Litigation

The pattern of liability law in environmental matters has been much the same as that in health and product liability--just much more compact. In fifteen years we have passed through the stages of development and regulation and moved quickly into the debate over responsiblity and for cost and damages.

The environmental issue of the 1970s was identifying and preventing harm. Today, having had the benefit of fifteen years of frustration and wisdom, we know that our efforts have been only partially successful.

Enormous gains have been made. Our environment is cleaner, our citizens safer. But even a quick scan of today's newspaper reveals a job half-done. Leaking landfills, poisoned water supplies, and deadly gases are facts of life in thousands of communities. We have improved, but our risks are still too great.

Some are satisfied saying we don't live in a risk-free society. I urge you to join me in rejecting that approach. We must commit ourselves to continued improvements and Congress must find the will to pass strong Clean Air, Superfund, and Safe Drinking Water laws. We may not be able to guarantee safety, but must reduce threats to human health to the lowest possible levels.

Since we are not preventing all harm, the emerging issue becomes compensating those who are injured. One of Congress' biggest challenges is to establish a fair and workable victims' compensation system that brings solace to injured citizens and sanity to our courts.

Unfortunately, many polluters and insurers disagree. They seem to believe it is the lawyers, not the pollution, that causes problems. After the Bhopal tragedy, it seemed lawyers and Union Carbide received about equal amounts of blame. That didn't make much sense, but it has become an all too familiar tactic of many companies.

We will hear it again soon. Yesterday two lawsuits, totalling $86 million, was filed on behalf of twenty-eight people who were injured by Union Carbide's Institute plant toxic gas leak. We no doubt will soon hear charges that the attorneys participating are simply exploiting an unfortunate situation. The predicatable negative media commentary will follow.

No blame is more misplaced. Are there lawyers who overreach and exploit? Of course. But the great majority often serve as the only real brake on polluter actions. When Congress is stymied in efforts to pass protective legislation, victims are left with only one recourse: the courts.

But this recourse is often not enough. International tragedies, like Bhopal, present extraordinary legal questions on jurisdiction, liability, and appropriate damages. But victims often face insurmountable legal problems even in domestic accidents. Inadequate state toxic tort laws leave many innocent victims without compensation.

Some hope can be found in the proposed Manville-asbestos settlement package. This landmark agreement could be a precedent for bringing justice to victims and solvency to companies. It is worth a very careful review.

But one successful settlement does not solve our broader problems. The fact remains that toxic torts, with their latent injuries, are incompatible with our nationwide patchwork of restrictive statutes of limitation and impossible burdens of proof.

What victims need, what the courts need, and what I think even industry needs, is a federal cause of action in all our environmental laws. An ideal federal cause of action could bring uniformity to our courts and justice to innocent victims.

Now I'll let you in on a secret. I think H.R. 2576, a bill I sponsored with several of my colleagues, has a provision very close to this ideal. The bill sets out a comprehensive approach to controlling a silent crisis: the routine and accidental releases of poison gas from thousands of chemical plants around our nation.

The bill would force EPA to collect better information, set tight standards, and vigorously inspect a plant's process systems. In addition, the federal cause of action provision establishes a strict, joint and several liability standard for manufacturers releasing hazardous substances into the air. Victims would be held to a three year statute of limitation from the date they knew, or through the exercise of reasonable diligence should have known, that a hazardous substance caused or significantly contributed to their injury.

This provision also contains an extensive causation section and is careful not to preempt or affect any state laws establishing liability to damages.

Such a provision makes good sense for all toxic tort cases, and would be particularly valuable in indivisible harm situations.

The bad news is that Congress has seemed unwilling to enact a strong federal cause of action provision. We fought on the losing end of this battle twice last year. On a close 208-200 vote on the House floor, a solid federal cause of action provision was deleted from the Superfund bill.

A similar provision was also deleted from the Safe Drinking Water Act reauthorization.

Neither bill was enacted last year. Unfortunately, federal cause of action provisions are missing from this year's version of both bills.

Conclusion

On all of these issues of liability reform--ranging from vaccines to Superfund--it is particularly important that the Congress now move carefully.

Preserving consumers' rights in courts is a particularly importatnt goal these days. As the Reagan Administration methodically moves to weaken, if not eliminate, the Nation's health and safety agencies, it is critical that consumers who have been injured or made sick be able to seek redress in the courts. It's disgraceful that, increasingly, people must suffer harm before effective action against products or dangers can be taken. Compensating consumers for injuries is a poor substitute for not injuring consumers to begin with. As long as our health and safety institutions--ranging from EPA to FDA and the Consumer Product Safety Commission--are threatened, we must be particularly careful to guard the tort system to guard against changes that might reduce safety incentives.

I look forward to working with you in creating more accessible and equitable remedies for those who are injured, and in fending off other more self-serving proposals.

I'll be happy to try to answer any questions you may have.